**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| PETER JACKSON, | ) | |
| | ) | |
| Claimant, | ) | **IC 02-018148** |
| v. | ) | |
| | ) | |
| JST MANUFACTURING, | ) | **FINDINGS OF FACT,** |
| | ) | **CONCLUSION OF LAW,** |
| Employer, | ) | **AND RECOMMENDATION** |
| and | ) | |
| | ) | |
| EVEREST NATIONAL INSURANCE COMPANY, | ) | FILED MAR 3 2005 |
| | ) | |
| Surety, | ) | |
| Defendants. | ) | |
| | ) | |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise, Idaho on September 20, 2004. Stephen J. Lord represented Claimant. Max M. Sheils, Jr., represented Defendants. The parties submitted briefs and the case came under advisement on January 31, 2005. It is now ready for decision.

## ISSUE

After due notice to the parties, the sole issue is whether Claimant complied with the notice requirements of the Idaho Workers' Compensation Law.

## CONTENTIONS OF THE PARTIES

Claimant contends he did not know he had a work-related occupational disease until after Joseph Crowley, M.D., so opined on April 10, 2002. Thus, this date is the date of manifestation and his May 3, 2002, notice of injury or illness is timely. Alternatively, if it is determined that he did know earlier or a qualified physician so informed him earlier, Defendants were not prejudiced by the timing of the notice.

Defendants contend Claimant knew he suffered from an occupational disease before Dr. Crowley's April 10, 2002, report. Claimant failed to notify Employer timely. Claimant failed to prove Defendants were not prejudiced by the untimely notice.

## EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant and by Employer's representatives Louise Bertagnolli and Tony Bertagnolli;

2. Claimant's exhibits 1 – 5;

3. Defendants' exhibits 1 – 4; and

4. Prehearing depositions of Claimant, Louise Bertagnolli, Tony Bertagnolli, and Joseph Crowley, M.D.

## FINDINGS OF FACT

1. Claimant began working for Employer on June 21, 1999, as a welder. He had performed the same type of welding at least intermittently since 1979 in Massachusetts.

2. Claimant underwent pulmonary testing on September 26, 2000, under treatment by Steven Greenberg, M.D. Although Joseph Crowley, M.D., interpreted these tests at that time, he did not examine Claimant and was not his treating physician until August 10, 2001.

3. About February 2001, Claimant anonymously filed a complaint with OSHA alleging air quality violations. OSHA testing revealed no particulate in excess of permissible exposure limits.

4. Claimant stopped working for Employer about April 4, 2001, claiming retaliation and discrimination for having filed the earlier OSHA complaint, and alleging depression and anxiety required medical leave.

5. Claimant underwent additional lung testing on August 10, 2001, with an X-ray on September 22, 2001.

6. Claimant first visited Joseph Crowley, M.D., on October 4, 2001. Dr. Crowley noted Claimant's 25-pack-year smoking history and that a "choking cough associated with dyspnea" began three to six months after Claimant began working for Employer. The history also noted Claimant had complained about it to a fellow co-worker and that Claimant's symptoms had not improved since he quit work six months earlier. Dr. Crowley diagnosed:

> Chronic dyspnea with mild restrictive ventilatory defect, mild reduction in diffusion capacity and mild airflow obstruction. Apparently he has some interstitial markings on his chest X-ray. He has symptoms of both airways disease and parenchymal disease. His symptoms began when he was exposed in the workplace raising the issue of workplace-induced lung disease. He is exposed to tungsten raising the possibility of giant cell interstitial pneumonitis and he has been exposed to nickel and other metals with welding raising the possibility of airways disease. His lung volumes have improved since he quit his job but he continues to have a low and actually decreasing diffusion capacity.

Dr. Crowley testified he probably told Claimant that Claimant's condition could be related to his work as a welder.

7. On October 5, 2001, CT scans were performed and Claimant underwent a methacholine challenge on October 17, 2001.

8. By October 31, 2001, Dr. Crowley diagnosed:

> Reactive airways disease which have been precipitated by welding and nickel exposure or baseline asthma. At this time it is hard to know, although his history suggests a component of RADS [reactive airways dysfunction syndrome]. He has moderate airway hyperresponsiveness at this time. . . . Pan sinusitis. . . . Left lower lobe ground glass opacity and thickening of uncertain etiology. I cannot rule out an early interstitial lung disease or an alveolitis. . . . Chronic obstructive pulmonary disease which by pulmonary function testing is mild.

9. On November 6, 2001, Claimant visited Matthew B. Schwarz, M.D., for sinusitis which began, Claimant reported, when moving from Massachusetts to Idaho at the time he began working for Employer.

10. On December 27, 2001, Claimant underwent additional CT scans.

11. On January 8, 2002, Dr. Crowley again saw Claimant and performed another methacholine challenge. Dr. Crowley noted by history, "Mr. Jackson returns today in follow-up of his asthma and reactive airways disease which I believe was likely precipitated by welding and nickel exposure." Dr. Crowley diagnosed, in part, "Reactive airways disease dysfunction syndrome with asthma – clearly improved on Advair and away from environmental exposures. Dr. Crowley recommended that Claimant "[c]ontinue to stay away from work environments with dust and fumes if possible."

12. Dr. Crowley testified that on January 8, 2002, he opined it more likely than not that certain of Claimant's conditions were caused by his work as a welder. He testified he "probably" told Claimant that opinion on that date, but did not remember the conversation independently of his notes.

13. On January 9, 2002, Dr. Schwarz noted he planned to perform sinus surgery. By April 10, 2002, Dr. Crowley noted the surgery had been performed.

14. On April 10, 2002, Dr. Crowley diagnosed:

> Reactive airways dysfunction syndrome with resultant asthma that is now improved, away from environmental exposures and on Advair. It is my professional opinion that this syndrome was caused by his exposures to nickel, chromium and welding on a more probable than not basis. . . . Baseline mild to moderate emphysema. . . . Mild weight loss.

15. Claimant filed a First Report of Injury or Illness on May 3, 2002, alleging he suffered respiratory disease from exposure to welding gasses while at work for Employer.

**Discussion and Further Findings**

16. **Notice.** Idaho Code § 72-448 requires written notice of the manifestation of an occupational disease be given to the Employer within 60 days after its first manifestation. Idaho Code § 72-102(18) defines "manifestation" as "the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease."

17. The parties stipulated Employer's first notice arrived on May 3, 2002. They dispute when Claimant's occupational disease was first manifest. Claimant's brief makes great distinction between what Claimant "suspected" or "believed" versus what he "knew" in arguing the date of manifestation was April 10, 2002, when Dr. Crowley unequivocally opined a part of Claimant's condition was caused by his work exposure.

18. It is the experience of the Commission that claimants often suspect or believe a condition to be work related when it is later shown to be unrelated. By itself, the onset of symptoms in the first few months of his work for Employer is insufficient to show Claimant knew he had an occupational disease in 1999. The September 2000 tests and treatment by Dr. Greenberg – including his finding of metal particles in Claimant's nose and ears – without a diagnosis or documented opinion of causation do not establish Claimant knew he had an

occupational disease. Dr. Crowley's notes and testimony support that in 2001 he considered a relationship to work merely a possibility or a part of the differential diagnosis. Further, Claimant's complaint to OSHA is merely an example of his suspicion and belief. By itself it is insufficient to establish that Claimant "knew" he suffered an occupational disease as late as the end of February 2002. *But see also,* Ewing v. Holton, 135 Idaho 792, 25 P.3d 105 (2001) (knowledge that symptoms were work related without a specific diagnosis is sufficient to establish manifestation).

19. Dr. Crowley's records show he opined Claimant suffered from a work-related condition on January 8, 2002. Magic words are not required to establish that the opinion was held to the requisite legal standard. Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211 (2000). The medical record alone is sufficient to establish *prima facie* causation for purposes of dating manifestation. Dr. Crowley's subsequent testimony supports it. (Causation is not at issue herein; this finding does not require nor presume that causation would be found or whether it should be apportioned if those issues were fully explored and litigated.)

20. Dr. Crowley testified he "probably" told Claimant his condition was work related during the visit of January 8, 2002. Had Dr. Crowley not testified, his record would be sufficient evidence that he informed Claimant at that time. The Commission does not require a doctor to independently recall every conversation he had with every patient; one purpose of a record is to preserve events which may later be lost to memory. That record and Dr. Crowley's subsequent testimony each independently require a finding that he informed Claimant he suffered from an occupational disease on January 8, 2002.

21. Claimant's subsequent testimony that he did not hear, recall, or understand is insufficient to negate the evidence of manifestation. Claimant so believed his respiratory

problem was related to work that he complained to OSHA. He willfully withheld his suspicions and beliefs from Employer through his tenure there and through unrelated litigation afterward until he finally began this new litigation by filing a notice on May 3, 2002. Claimant's denial of recollection or understanding of the content of his conversations with Dr. Crowley is not credible.

22. Idaho Code § 72-704 allows that lack of timely notice shall not bar a claim if the claimant shows the employer has not been prejudiced by the untimely notice. Here, Employer is unquestionably prejudiced by Claimant's failure to notify Employer during his employment and afterward until the date of manifestation found herein. However, Claimant did not have a legal obligation to notify Employer before January 8, 2002. That prejudice is not recognizable under the statute.

23. Employer's witnesses did not well describe what they might have done differently if Claimant had provided a timely notice. Mrs. Bertagnolli did testify that Employer would have instructed him to visit a doctor. Nevertheless, Idaho Code § 72-432 provides an employer has the initial opportunity to designate the physician from which a claimant should seek medical treatment. Claimant was already seeing Dr. Crowley at the time.

24. Idaho Code § 72-704 requires a showing that an employer was not prejudiced by untimely notice. To require an employer to show it was prejudiced by untimely notice would shift the burden of proof contrary to the express language of the statute. Employer need not prove nor specifically identify the prejudice it suffered. Here, under all facts and circumstances, Claimant failed to prove it likely that Employer was not prejudiced by the untimely notice.

## CONCLUSION OF LAW

Claimant failed to give timely notice of his alleged occupational disease as required by Idaho Workers' Compensation Law.

## RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED in Boise, Idaho, on this 2ND day of March, 2005.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 3RD day of MARCH, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Stephen J. Lord
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db /S/_____